APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
(Argued April 17, 1975)
August 14, 1975

Before
Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 74-1958 *vs.*

TROY HONEYCUTT,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division
No. 74 CR 136
WILLIAM J. LYNCH, *Judge.*

ORDER

Appellant. Troy Honeycutt, was convicted by a jury on two counts of perjury before a grand jury in violation of 18 U.S.C. §1623.[1] The grand jury was investigating ex-

[1] The relevant portion of 18 U.S.C. §1623 states that: "whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly make any false material declarations . . . shall be fined . . . or imprisoned. . . ."

tortion allegedly perpetrated by Chicago police officers against local tavern owners.

The two-count indictment charged that Troy Honeycutt, owner of the Vanity Fair Tavern, did knowingly make false material declarations before the federal grand jury on July 12, 1973 and December 7, 1971. Both counts allege that Honeycutt testified falsely when he denied that he had been approached by police officers to "pay" money in connection with his business, the Vanity Fair Tavern.[2]

The evidence presented clearly established that Honeycutt turned money over to various Chicago policemen in response to solicitation amounting to extortion. He argues that transfers so motivated were not payments and either, that his answers were literally true; or that the word "pay" is so inherently ambiguous that the government had the burden of alleging and proving the particular meaning intended at the time of the testimony.

The petitioner's reliance on *Bronston* v. *United States,* 409 U.S. 352 (1973) is inapposite. *Bronston* narrowly held that an unresponsive but literally true answer cannot be the basis of a perjury conviction even where the defendant is intentionally trying to and does successfully mislead the questioner. In ordinary usage, "payment" includes a transfer of money motivated as Honeycutt's was, even though it would also include transfers of money otherwise motivated. We are neither faced with an unresponsive answer nor an answer which is literally true on its face, as in *Bronston* v. *United States, supra.*

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[2] In addition, both counts charged that the defendant denied that he "paid"; that he had made "payments"; or that he had knowledge of other tavern owners "paying" money to police officers as part of an extortion plan.

A perjury conviction which is based on a phrase that does not have a "meaning about which men of ordinary intellect could agree, . . . [or] one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony" must be reversed. *United States* v. *Lattimore*, 127 F.Supp. 405, 410 (D.D.C. 1955), *aff'd*, 232 F.2d 334 (D. C. Cir. 1955). This clearly is not the situation here.

The word "pay" neither is prone to widely divergent views nor necessitates a purely subjective interpretation as did the phrase "follower of the Communist line" in *Lattimore, supra.* Absent a word or phrase which is fundamentally ambiguous, the mere fact that a party contends that he accorded a different meaning to a word than did the questioner, is not sufficient to foreclose a jury from determining the meaning that the defendant attributed to that word. *United States* v. *Diogo*, 320 F.2d 898, 907 (2nd Cir. 1963); *see also, Seymour* v. *United States*, 77 F. 2d 577 (8th Cir. 1935). We cannot say, as a matter of law, that defendant was not bound, at the time of his testimony, to understand the word "payment" as including a transfer of money in the context of extortion. Moreover, the content of statements by the foreman of the grand jury and Honeycutt's testimony before grand jury tended to show that everyone involved used the word "payment" to include a transfer of money prompted by an extortion.

The jury must determine what the defendant's understanding of the word "pay" was and, using that meaning, decide whether his response was true or false. *United States* v. *Wall*, 371 F.2d 398 (6th Cir. 1967); *see also, United States* v. *Lattimore*, 127 F.Supp. 405, 410 (D.D.C. 1955), *aff'd*, 232 F.2d 334 (D.C. Cir. 1955). If false, the jury must

then decide if the response was made knowing it to be false. Only when the statement is false, as determined by the defendant's understanding of the words used, and is made knowing it to be false will a perjury conviction under 18 U.S.C. §1623 be affirmed.

We feel that whether defendant's understanding of the meaning of "payment" excluded a transfer in response to extortion, as he claimed, was a jury question.

Appellant argues that "Government Instruction No. 6"[3] constituted plain error because it assumes the defendant's declaration to be false. No objection to this instruction was raised at trial and therefore one cannot be raised on appeal unless the error was "evident or obvious." See, Fed.R.Crim.P. (30) and (52b), 18 U.S.C.A.; *United States* v. *Jansen*, 475 F.2d 312, 318 (7th Cir. 1973), *cert. denied*, 414 U.S. 826. *See also, United States* v. *Hood*, 493 F.2d 677, 682 (9th Cir. 1974), *cert. denied*, 419 U.S. 852. We do not see how the jury could have been misled by this instruction into the view that the judge was either foreclosing the defendant's claim as to his understanding of the meaning of the word "pay," or charging the jury to the effect that the defendant's answers were false.

Government Instruction No. 6 merely presented the elements which must be proved under 18 U.S.C. §1623. Subsequent instructions, specifically Government Instructions No. 8 and 19B, explain these elements and take into

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[3] To convict the defendant, the government must have proven beyond a reasonable doubt as to the count then under consideration by you:

(3) That the defendant then and there knowingly and contrary to his oath made the false material declaration set forth in that count.

consideration the defendant's interpretation of the word "pay." We find no error with this instruction, and certainly there was no "plain error."

Appellant next attacks Government Instruction No. 19B as erroneously stating that the word "pay" and its derivatives are not "fundamentally ambiguous." In this context the phrase "fundamentally ambiguous" does not mean that the words used cannot have more than one meaning, but instead it implies that meaning can be attributed to the word "pay" without resorting to a purely subjective interpretation by the jury as in *Lattimore* v. *United States, supra.*

Appellant further argues that a sentence in Government Instruction No. 19b[4] directs the jury to enter a guilty verdict. We disagree. This sentence is indeed awkward, especially when read alone, but when viewed in the context of the overall charge an improper view is not likely to be formed.

Appellant also complains that the trial judge erroneously failed to charge the jury as requested. We find no merit in this contention. The proffered defense instructions were in part erroneous and in part confusing. Those instructions that were meritorious were adequately covered by the instructions that were given.

Jury instructions cannot be read in isolation on appeal, ". . . but must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973).

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[4] "If you do not find that the declarant was misled or construed or interpreted words and/or phrases in such a manner that the allegedly false declarations were not believed by the defendant to be false when made then the false declaration is wilful."

Reading the entire charge as a whole we are convinced that the jury, aware of the appellant's claimed understanding of the word "pay," found that he knowingly made a false declaration to the grand jury. Moreover, in reviewing jury instructions, the charge must be viewed as part of the whole trial. *United States* v. *Park*, ... U.S. ....., 43 U.S.L.W. 4687, 4692 (1975). Throughout the entire trial the jury was made aware of the defendant's claimed conception of the word "pay." Nevertheless, after taking this into account, the jury determined that the defendant knowingly made a false declaration.

Viewed as a whole in the context of the trial we do not find the charge misleading.

The Clerk of this court is directed to enter judgment affirming the judgment of the district court.

APPENDIX B

The statutory provisions referred to herein read, in pertinent part:

18 U.S.C. Sec. 1621:

"Whoever, having taken an oath . . . in any case in which a law of the United States authorizes an oath to be administered, that he will testify . . . truly . . . and contrary to such oath states . . . any material matter which he does not believe to be true, is guilty of perjury . . ."

18 U.S.C. Sec. 1623:

"Whoever under oath . . . before . . . [a] grand jury of the United States knowingly makes any false material declaration . . . shall be fined . . . or imprisoned."